

REMARKS/ARGUMENTS

Re-examination and favorable reconsideration in light of the above amendments and the following comments are respectfully requested.

Claims 32 - 73 are pending in the application. All claims stand rejected.

By the present amendment, claim 40 has been amended.

In the office action mailed October 3, 2008, claims 32 - 39, 53, 56 - 69, and 72 - 73 were provisionally rejected on the grounds of nonstatutory obviousness type double patenting as being unpatentable over claims 37 - 45, 48, 52, 58, 59, and 66 - 81 of copending Application No. 10/543,077 in view of PCT publication no. WO00/64769 to Dambricourt; claims 32 - 71 were rejected under 35 U.S.C. 112, second paragraph, as being indefinite; claims 32 - 45, 50 - 61, 66, and 70 - 73 were rejected under 35 U.S.C. 103(a) as being unpatentable over PCT publication WO/2001/068355 to Dambricourt in view of U.S. Patent No. 5,314,746 to Johnson et al. and Dambricourt '769; claims 46 - 49 were rejected under 35 U.S.C. 103(a) as being unpatentable over Dambricourt '355 in view of Johnson et al., Dambricourt '769, and U.S. Patent No. 3,839,890 to Phlippoteau; claims 67 and 69 were rejected under 35 U.S.C. 103(a) as being unpatentable over Dambricourt '355 in view of Johnson et al., Dambricourt '769 and U.S. Patent No. 5,372,863 to Nishikawa; and claims 63 - 65 were rejected under 35 U.S.C. 103(a) as being unpatentable over Dambricourt '355 in view of Johnson et al., Dambricourt '769, and PCT publication no. WO/2001/094213 to Doherty et al.

The foregoing rejections are traversed by the instant response.

With regard to the provisional obviousness type double patenting rejection, this rejection should be withdrawn for the following reasons. The rejected claims of the instant application differ from the claims in the copending application serial no. 10/543,077. In particular, the claims of the '077 application, which concern a flexible tube made from polypropylene, do not mention the problem of lack of reversibility of a fully emptiable flexible tube which undergoes deformation, nor a solution to this problem, which consists in the fully emptiable tubes of the present invention with an amplified return effect. Certainly, the Examiner fails to point out where all the features set forth in the rejected claims can be found in the claims of the '077 application. While the Examiner relies upon Dambricourt '769 to show the ratio of the determined perimeter to the joining radius being at least equal to 4.5, the Examiner offers no articulated line of reasoning as to why one of skill in the art would select this teaching from Dambricourt '769. The Examiner's statement as what would motivate one of ordinary skill in the art is merely a conclusory statement, which is insufficient to establish obviousness.

With regard to the rejection under 35 U.S.C. 112, second paragraph, there is nothing improper about Applicant's use of the word "substantially." It is a term which has long been used in claims. The word is used in its ordinary context to mean "essentially." The analysis by the Examiner on this matter is incomplete. For example, claim 50 clearly says that "the skirt, as far as its joining with the neck, has a wall thickness having a first value that is substantially constant and substantially identical to the median thickness, ..." Applicant submits that the claim language itself provides a standard for ascertaining the requisite degree when the claim is read in its entirety. As

for claim 32, the Examiner does not point out why one of skill in the art could not ascertain what is meant by "substantially constant wall thickness." A claim is indefinite only if it fails to clearly delineate the boundary between the claimed and the unclaimed subject matter. *In re Vogel*, 422 F.2d 438, 422 (CCPA 1970). The boundary is clear from claim 32. If the wall thickness is not essentially constant, the wall thickness falls outside what is being claimed.

With regard to claim 40, the term "preferably" has been deleted. With regard to claims 62 and 68, it is not the function of the claims to explain "how" anything is done. The second paragraph of section 112 only requires applicants to particularly point out and distinctly claim that which is their invention. The Examiner has failed to show how the language of claims 62 and 68 does not meet the notice function of the second paragraph of section 112. Further, in determining if the claims are indefinite, claim language is analyzed in light of the teachings of the prior art and in light of the particular application disclosure as it would be interpreted by one having ordinary skill in the art. *In re Moore*, 439 F.2d 1232, 1235 (CCPA 1971). The Examiner has not explained why one of ordinary skill in the art would not understand the claimed subject matter taking into account both the prior art and the written description.

For these reasons, the rejection under 35 U.S.C. 112, second paragraph, should be withdrawn.

With regard to the rejection of claims 32 - 45, 50 - 61, 66, and 70 - 73 on obviousness grounds over Dambricourt '355 in combination with Johnson et al. and Dambricourt '769, this rejection fails for the following reasons.

Claim 32 is directed to a fully emptiable tube provided with a wall resistant to stress-cracking and forming a water barrier, said tube comprising a flexible skirt and a head, the flexible skirt being elongate in an axial direction and having, at one end of the tube, a filling end sealed by crushing the flexible skirt along a transverse direction and the head comprising at least one evacuation orifice and a flexible neck forming a radial extension of the at least one evacuation orifice and connecting with the flexible skirt, at least the flexible skirt and flexible neck forming a single-piece assembly, a wall at the joining of the flexible neck with the flexible skirt in a longitudinal plane containing the axial direction and perpendicular to the transverse direction having a determined joining radius, and the flexible skirt in a plane transverse to the axial direction and at mid-distance between an end of the flexible neck forming the at least one evacuation orifice and the filling end of the tube having a determined perimeter and a substantially constant wall thickness, the ratio of the determined perimeter to the joining radius being at least equal to 4.5, wherein the wall in the transverse plane has a median thickness of between 0.30 mm and 1.20 mm, wherein the tube consists of a mixture of a number "n" where n is at least equal to 1 of the polymers belonging to a family of copolymers-olefins prepared from C₂ to C₁₀ monomers, wherein at least a first polymer of the mixture belongs to the polypropylene family, and wherein the constituent mixture of the tube wall has a flexural modulus of no more than 700 MPa according to standard NF EN ISO 178.

Claim 73 is directed to a method for fabricating a flexible, fully emptiable tube consisting of a skirt and a head comprising at least one evacuation orifice and a neck forming a

radial extension of the orifice and being joined to the skirt, the skirt and the neck forming a single-piece assembly resistant to stress-cracking and forming a water barrier, comprising the steps of: using as constituent material of a wall of the tube a mixture of a number "n" where n is at least equal to 1 of polymers belonging to the family of copolymers-olefins prepared from C₂ to C₁₀ monomers, a first polymer belonging to the polypropylene family, the mixture of polymers having a flexural modulus of no more than 700 MPa, and the wall having a thickness of between 0.30 and 1.20 mm; and fabricating the skirt and head of the tube by injecting the mixture, in a single injection operation, into an injection mould comprising an impression and a core, said core comprising a central part of which one free upper end center bears upon the impression at least during the skirt injection phase.

Neither the '355 nor the '769 PCT patent publications mentions the problem of lack of reversibility of a fully emptiable flexible base which undergoes deformation. Moreover, even if the '769 document discloses a preferred embodiment of a fully emptiable tube, provided with a wall resistant to stress cracking and forming a water barrier, the '769 document only gives a general designation of the material of the tube (thermoplastic material such as polypropylene).

The Johnson et al. patent discloses films of propylene-ethylene co-polymers (see claim 10 and the specification, col. 8, lines 3 to 5). According to the Johnson et al. specification in column 8, lines 16 to 20, these copolymers present a flexural modulus, which ranges from 20,000 psi to 100,000 psi, and preferably from 40,000 psi to 70,000 psi, i.e. from 137.8 MPa to 689.7 MPa, and preferably from 275.9 MPa to 482.8 MPa. These propylene copolymers thus present high "hand" properties of

softness and quietness and very high toughness (column 1, lines 61 - 62). These films are soft and pliant with a "cloth-like drape and feel" (see column 1, lines 64 - 65). Thus, these films are intended to be used for certain applications such as healthcare films, microwave bags, grocery bags, surgical drapes, etc. Johnson et al. makes no mention of using these materials as a flexible tube, nor a fully emptiable tube. Furthermore, the teachings in Johnson et al. clearly show that the polymer films are not appropriate for the production of fully emptiable tubes.

It is well settled law that the Examiner has the burden of establishing a *prima facie* case of obviousness. See *In re Rijckaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993). Obviousness requires a suggestion of all elements in a claim (*CMFT, Inc. v. Yieldup Int'l Corp.*, 349 F.3d 1333, 1342 (Fed. Cir. 2003)) and "a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does." *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1741 (2007); also see *Ex parte Alexander*, 86 USPQ2d 1120, 1121 (BPAI 2007). As stated in *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006), there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.

An obviousness determination also requires that a skilled artisan would have perceived a reasonable expectation of success. See *In re O'Farrell*, 853 F.2d 894, 903-04 (Fed. Cir. 1988). However, to have a reasonable expectation of success, one must do more than merely vary all parameters or try each of numerous possible choices until one possibly arrived at a successful result. The prior art fails to provide the requisite reasonable expectation of success where it teaches merely to

pursue a general approach that seems to be a promising field of experimentation, and where the prior art gives only general guidance as to the particular form of the claimed invention or how to achieve it. See *O'Farrell*, at 903-04. The expectation of success must be founded in the prior art, not in the applicant's disclosure. *In re Dow Chem. Co.*, 837 F.2d 469, 473 (Fed. Cir. 1988).

Given the fact that the materials disclosed in Johnson et al. are unsuitable for forming fully emptiable tubes, the requisite reasonable expectation of success is not present. Thus, one of ordinary skill in the art would not be motivated to combine Johnson et al. with the primary reference and the Examiner has failed to make out a *prima facie* case of obviousness. While one can vary parameters or try each of numerous possible choices until one arrives at the claimed invention, this does not establish that the claimed invention is obvious because the references fail to provide the necessary guidance. Consequently, it is far from apparent that one of ordinary skill in the art would have highlighted the problem of lack of reversibility of a fully emptiable flexible tube which undergoes deformation. Again neither the '835 nor the '769 references mentions such a problem and/or a solution to it and the Johnson et al. reference only discloses soft films which are not suitable for the production of a fully emptiable tube.

For these reasons, claims 32 and 72 are allowable over the cited and applied references.

Claims 33 - 45, 50 - 61, 66, 70, 71, and 73 are allowable for the same reasons as their parent claims as well as on their own accord.

With respect to the obviousness rejections of claims 46 - 49, 63 - 65, 67, and 69, these claims are allowable for the same

reasons as their parent claims as well as on their own accord. The Phlippoteau, Nishikawa, and Doherty et al. references do not cure the aforementioned deficiencies of the Dambricourt patent documents and the Johnson et al. reference.

With respect to the terms AFFINITY and EXACT, these terms are only known to Applicant as trade names. Thus, the superscript TM has not been applied. It is also noted that these terms are used in CAPITAL LETTERS (see pages 15 and 16) and on page 16, the generic terminology is described. Applicant can not find any requirement in the patent rules that trade names must always be accompanied by the generic terminology. If the Examiner is aware of such a rule, he is requested to point it out to Applicant. One would think that just one such occurrence is sufficient for one of ordinary skill in the art to understand what is being discussed.

With respect to the drawings, reference numeral 32 in Fig. 6 has been changed to "320". The Examiner is hereby requested to approve the replacement sheet of drawings since it does not contain any new matter. Additionally, paragraph [0146] on page 25, line 2 of the specification has been amended to parallel the change to Fig. 6.

With regard to the reference numeral "17", it has been added to paragraph [0153] on page 26 of the specification.

For the foregoing reasons, the instant application is believed to be in condition for allowance. Such allowance is respectfully solicited.

Should the Examiner believe an additional amendment is needed to place the case in condition for allowance, he is hereby invited to contact Applicant's attorney at the telephone number listed below.

A request for a three month extension of time is enclosed herewith. The Director is hereby authorized to charge said extension of time fee in the amount of \$1,110.00 to Deposit Account No. 02-0184.

If any additional fees are required in connection with this case, it is respectfully requested that they be charged to Deposit Account No. 02-0184.

Respectfully submitted,

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Date: April 3, 2009